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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY, INC. Plaintiff, v. DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS THUNDERWOOD HOLDINGS, INC.; TODD DUNNING; DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIAN DUNNING.COM and DOES 1 through 20, Defendants.	CASE NO.: CV-08-4052 JF **REQUEST FOR JUDICIAL NOTICE BY DEFENDANTS TODD DUNNING AND DUNNING ENTERPRISE, INC. IN SUPPORT OF THEIR MOTION TO DISMISS** Date: December 12, 2008 Time: 9:00 a.m. Place: Courtroom 3, 5th Floor 280 South First Street San Jose, CA 95113

Pursuant to Federal Rule of Evidence 201, Defendants Todd Dunning and Dunning Enterprise, Inc. request that the Court take judicial notice of the following public records in its consideration of Defendants' pending motion to dismiss under Fed. R. Civ. Pro. 12(b)(1), (3) and (6):

(1) The Second Amended Complaint for Damages, and exhibits thereto, filed in the Superior Court of the State of California for the County of Orange, entitled "*Commission Junction, Inc., plaintiff v. Thunderwood Holdings, Inc. dba Kessler's Flying Circus; Todd Dunning; Brian Dunning,*

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and Does 1 through 50, inclusive, defendants," Case No. 30-2008-00101025. A true and correct copy is attached as Exhibit A.

(2) The Answer to the Second Amended Complaint filed by defendants Todd Dunning and Kessler's Flying Circus filed in the Superior Court of the State of California for the County of Orange, entitled "*Commission Junction, Inc., plaintiff v. Thunderwood Holdings, Inc. dba Kessler's Flying Circus; Todd Dunning; Brian Dunning, and Does 1 through 50, inclusive, defendants,"* Case No. 30-2008-00101025. A true and correct copy is attached as Exhibit B.

(3) The Cross Complaint by Defendant Kessler's Flying Circus against plaintiff Commission Junction, Inc., also pending in the Superior Court of the State of California for the County of Orange, entitled *"Kessler's Flying Circus, a general partnership, Cross-Complainant v. Commission Junction, Inc. and Cross- Does 1 through 10, inclusive, Cross-Defendants"* Case No. 30-2008-00101025. A true and correct copy is attached as Exhibit C. Commission Junction, Inc. filed a demurrer to this Cross-Complaint which is set for hearing on November 5, 2008, in that court.

For purposes of a motion under Fed. R. Civ. Proc. 12(b) the Court may take judicial notice of "matters of public record." *Lee v. City of Los Angeles*, 250 F. 3d 668, 688-89 (9th Cir. 2001). These two pleadings from the Orange County Superior Court are the kind of public records for which this Court may take judicial notice in ruling on this motion. These pleadings are each filed in the Orange County Superior Court. Furthermore, a Court "may take judicial notice of 'matters of public record'" without converting a Rule 12(b)(6) motion to dismiss into a motion for summary judgment. *Id.* (quoting *Mack v. South Bay Beer Dist.*, 798 F 2d 1279, 1282 (9th Cir. 1986). The moving party requests only that this Court take judicial notice of the existence and content of these pleadings as filed in the Superior Court, and the Court is not requested to accept the truth of any allegations contained therein.

Dated: October 27, 2008

FREELAND COOPER & FOREMAN LLP

By: /s/

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